No. 10-740

FEB 23 2011

IN THE

Supreme Court of the United States

EMIGRANT SAVINGS BANK,

Petitioner,

v.

METAVANTE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT METAVANTE CORPORATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Metavante Corporation states that its parent company is Metavante Holdings, LLC (formerly Cars Holdings, LLC), which is wholly-owned by Fidelity National Information Services, Inc. Fidelity National Information Services, Inc. is a publicly-traded corporation.

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INTRODUCTION

On each of the two issues presented, the petition for a writ of certiorari asks the wrong question, embarks down the wrong road to answer it, and unsurprisingly comes up with the wrong answer.

Petitioner first contends the Seventh Circuit improperly conflated prongs (1) and (2) of Rule 702 of the Federal Rules of Evidence based on a partial quote of the opinion below juxtaposed against an excerpt from the Rule itself. Contrary to petitioner's assertion, the Seventh Circuit did not conclude "that experience may *substitute* for data." Pet. 13-14. Rather, above and beyond the expert's experience, the Seventh Circuit specifically noted the facts and data the expert considered, observing that in reaching his conclusions the expert "placed particular importance on 'the level of deposits that were achieved in the system, the number of accounts that were opened, transactions that were involved,' as well as Metavante's responsiveness to Emigrant's concerns and issues." 16a (citation omitted). The Seventh Circuit also emphasized that the expert's testimony was not *ipse dixit*, but instead was based on principles and methods from the financial sector in precisely these areas of technology. 18a-19a. And the Seventh Circuit acknowledged the expert analyzed the data and facts from the same perspective of financial services firms that have evaluated technological innovations in the past. 20a. The court's conclusions satisfy all three subparts of Rule 702.

The Seventh Circuit's decision to affirm the admission of the expert testimony in this case, and its standard for doing so generally, cannot by any

stretch be called "lax" or in conflict with any other circuit. Indeed, the Seventh Circuit on many occasions has acknowledged the distinction between an expert's qualifications on the one hand and the factual bases for his opinions on the other, and has rejected testimony that does not satisfy all three subparts of Rule 702, just as it has admitted expert testimony that does, as was the case here. At bottom, the petition's complaint is one going to the weight to give the expert's testimony in this bench trial, not its admissibility. But all this is entirely beside the point, because at the end of the day the courts below expressly gave both parties' experts' opinions little if any weight. 21a, 79a-80a, 86a. Thus, the evidence petitioner challenges did not affect the judgment, making this case wholly unworthy of review. *See* FED. R. CIV. P. 61.

The second issue is not appropriate for review for the simple reason that the fee question in this case is not and never has been *what* are reasonable attorneys' fees, but *how to show* reasonableness. Petitioner's central argument in both the district court and on appeal was that the district court should have required the submission of a particular type of evidence to demonstrate reasonableness. Specifically, petitioner argued that respondent should have been required to provide the district court with unredacted invoices showing line-by-line the specific tasks each attorney performed on a given day. *See* Pet. Opening Br. in Appeal No. 09-3996 at 15-21; Pet. Reply Br. in Appeal No. 09-3996 at 4-12.

The petition's assertion that the Seventh Circuit "did not address Emigrant's argument (raised in the district court and on appeal) that submission of

redacted bills effectively prevents the opposing party from challenging reasonableness, as it is entitled to do under Wisconsin law," is manifestly inaccurate on two levels. Pet. 11. First, the lower courts squarely addressed—and rejected—petitioner's argument about redacted bills. 47a fn. 20, 52a-54a, 53a fn.22, 67a, 67a fn.5. Second, the lower courts were never asked to apply, and thus did not pass upon, whether to apply Wisconsin law to the question of whether redacted invoices could properly support a motion for fees.

The only "what" question that was asked below or was at issue—who is the "prevailing party" under § 17.8 of the parties' fee-shifting agreement—was indisputably answered by the lower courts according to Wisconsin law. K12.[1] The petition's repeated statements that something other than Wisconsin law was applied to that question are directly contradicted by the record. After applying Wisconsin law to the prevailing party question, the courts below at both parties' request followed federal procedures to review the attorneys' fees issue; the primary dispute was over the use of redacted invoices. Petitioner did not merely acquiesce to the application of Seventh Circuit law on the question of redacted bills, but affirmatively embraced it and urged its application. Petitioner now improperly reverses course. *Compare United States v. Williams*, 504 U.S. 36, 43-44 (1992).

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[1] The parties' full agreement is labeled K1-41 and is attached to Respondent's brief in Appeal No. 09-3007. (The version of the agreement included in petitioner's appendix below did not contain certain pages that undermined petitioner's position.)

Perhaps most striking about the petition as it pertains to the second issue presented is that it fails even to mention the governing rule, Federal Rule of Civil Procedure 54(d)(2), or the authority under which it issued, the Rules Enabling Act, 28 U.S.C. § 2072. Rule 54(d)(2) specifically governs the timing and contents of a motion for fees, the nature and quantum of evidence required, and the proceedings relating thereto. FED. R. CIV. P. 54(d)(2)(A)-(E). Whether in its discretion a trial court should be allowed to consider redacted attorney invoices as part of a motion for fees falls squarely under Rule 54(d).

Accordingly, unlike the scenario about which the petition hypothesizes, in cases like this one, courts apply the federal rule unless it transgresses either the terms of the Rules Enabling Act or constitutional restrictions. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). *See also, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010). Rule 54 transgresses neither. The petition's failure to grapple with Rule 54 at the outset rather than saving it for reply—particularly since it is an essential fork-in-the-road question, and both sides argued Rule 54's applicability below (*see, e.g.*, Pet. Reply Br. in Appeal No. 09-3996 at 11) (arguing that Fed. R. Civ. P. 54(d)(2)(B)(iii) requires the disclosure of certain evidence)—is reason alone to deny the petition. *See* Supreme Court Rule 14.4. In all events, petitioner's complaint matters not because Wisconsin law does not bar a trial court from considering redacted invoices.

What is really going on here, as the district court observed, is that petitioner's conduct "is driven by

the hard reality of one trying to avoid its contractual obligations." 105a. Respondent brought a collection action in a Wisconsin county court to get paid for its services. Petitioner turned that routine dispute literally into a federal case, removing it to federal court. Later petitioner sought to exert settlement pressure on respondent on the eve of mediation by adding absurd fraud counterclaims seeking a quarter billion dollars in alleged damages, plus unspecified punitive damages. So far-fetched were petitioner's allegations that the district court found they did not "even merit[] serious consideration as a fraud claim." 105a. Petitioner now has pulled out all the stops to avoid paying its tab, seeking review by the highest Court in the land of an everyday breach-of-contract case by dressing up the opinion below, not to mention the record, in unrecognizable garb. The petition should be denied.

COUNTERSTATEMENT OF THE CASE

Because petitioner's statement of the case is incomplete and inaccurate, respondent presents the following counterstatement.

A. Background

In January 2005, petitioner launched EmigrantDirect online bank. Using respondent's services, petitioner opened more accounts with more deposit dollars in 19 months that it had in the prior 1,800 months (150 years) of the bank's existence. 136a ¶ 77. So exceptional were respondent's services that 10 months after the launch of EmigrantDirect—which in litigation petitioner claimed was well after the alleged defects in respondent's services were prevalent and obvious, 134a ¶ 70—petitioner approached respondent about expanding their

relationship to include using respondent's services for business accounts. 133a-34a ¶ 69. Respondent declined because by then petitioner was already refusing to pay for the services it used. 10a, 144a ¶ 107. Shortly thereafter, in the fall of 2005, respondent filed a lawsuit to get paid the money petitioner owed.

This case began as a collection action in Wisconsin state court. 1a. After a year of litigation and on the eve of mediation, Emigrant amended its pleadings to allege fraud and several other new counterclaims. 11a. This uncomplicated, basic contract case thus mushroomed into a complex, massive litigation spanning years and sparking over 500 docket entries by the time of trial in May 2009, "requiring the commitment of significant judicial resources to bring the case to fruition." 80a. The district court dismissed or granted summary judgment on most of petitioner's counterclaims. Dist. Ct. Dkt. 115, 426, 492. The remaining claims—respondent's claims for breach of contract and declaratory judgment, and petitioner's counterclaims for fraudulent inducement, intentional misrepresentation, and breach of contract—were tried to the bench, the Honorable J.P. Stadtmueller, United States District Court for the Eastern District of Wisconsin, in May 2009. During the two-week trial, 28 witnesses testified live or by deposition, and the parties filed more than 300 exhibits. 80a-81a. Despite petitioner's vigorous efforts to transform it, "this is," as the district court aptly noted, "in the final analysis a breach of contract case." 80a.

Based on its "independent fact-finding process" and consideration of all of the trial evidence, the

court found in favor of respondent on each and every claim and counterclaim. Dist. Ct. Dkt. 550. Petitioner appealed the counts tried to the bench, but not the pretrial dismissal of Counts IV, V, VI, VII, and VIII of petitioner's counterclaims. Petitioner also appealed the district court's fee award. 55a-73a. The Seventh Circuit consolidated the fees and merits appeals. A unanimous panel of the Seventh Circuit (Ripple, Manion, Tinder, J.J.) affirmed. *See* 1a-54a. Petitioner did not petition for rehearing or rehearing *en banc*.

B. The Expert Issue

David Moffat is an expert in the financial services industry and the performance of financial technology services agreements. 16a. Mr. Moffat, a former CEO of a technology consultant company, has led a number of technology application evaluations and implementations by leading financial services institutions including State Street Bank, Citibank, Oppenheimer Funds, Vanguard, and Franklin Templeton. Dist Ct. Dkt. 440-1 Ex. 4; Dist. Ct. Dkt. 518-7 at 6-7. Mr. Moffat has years of experience in the development, distribution and management of various financial services software products and the negotiation of numerous service agreements with global financial institutions similar to the services and agreement at issue in this case. *Id.*

Mr. Moffat was the only expert to examine all the appropriate facts and data so as to provide a reliable basis to opine on the question of whether respondent provided its financial technology services in a commercially reasonable fashion. For example, Mr. Moffat examined all of the data pertaining to respondent's service level performance for all of the

applications and services it provided under the parties' agreement. *See, e.g.*, 127a-130a ¶¶ 44-57. Petitioner's expert, Roger Nebel, in contrast did not. 131a ¶ 58. Mr. Nebel did not even compare respondent's services to any other direct bank when evaluating whether they were provided in a commercially reasonable manner. 133a ¶ 67. Mr. Moffat also analyzed and based his opinion on critical data such as the number of transactions processed using respondent's services and the number of accounts opened. Dist. Ct. Dkt. 541 at 4-5.

Upon consideration of two sets of fully-briefed motions, one before trial and another after, the district court denied petitioner's motion to exclude and strike Mr. Moffat's testimony. 79a. The Seventh Circuit concluded, however, that the district court did not sufficiently articulate its reasons for admitting Mr. Moffat's testimony in this bench trial, and thus engaged in its own independent analysis before concluding Mr. Moffat's testimony satisfied FED. R. EVID. 702. 16a-17a. The Seventh Circuit held that petitioner's "criticisms do not go to admissibility but to the appropriate weight that should be accorded to the evidence." 20a. The appellate court noted that the district court "made it very clear that, in the final analysis, it found [the parties' expert testimony] of limited utility in making a final determination in the case." 21a. The district court put it this way:

> And in this particular case, while to be sure the expert testimony was indeed instructive on a whole host of subjects, in the final analysis it fortunately or unfortunately, I

> guess depending on one's perspective, does not control the day. As we will learn momentarily, this is in the final analysis a breach of contract case; and it is driven by documentation together with the results of the performance under the contract....

79a-80a. *See also* 86a.

The petition's contention that the district court nonetheless relied heavily on Mr. Moffat's testimony, and that Mr. Moffat was the only witness to testify as to the commercial reasonableness of respondent's services, cannot be reconciled with the record or the lower courts' opinions. Pet. 5. An avalanche of documentary and testimonial evidence above and beyond Mr. Moffat's opinions demonstrated convincingly that respondent provided its services in a commercially reasonable manner. *See, e.g.*, 128a ¶ 48, 129a ¶ 50, 131a ¶ 60, 132a ¶ 63, 134a-135a ¶¶ 71-72, 137a ¶ 82, 141a-142a ¶ 99. The Seventh Circuit affirmed the district court's finding as to commercial reasonableness after considering the extensive record. 26a-29a.

C. The Fee Issue

The petition's rendition of events here reads as if there had been no findings of fact by the district court after a hard-fought trial or a lengthy opinion by the court of appeals after two full sets of briefs in the combined appeals. The trial court made clear-cut findings that, for example, there was no separate "in-house claim," which the Seventh Circuit affirmed. 45a. After petitioner contended it was a prevailing party even though it lost on each and every claim and counterclaim, the trial court framed the issue under Wisconsin law as follows:

> In Wisconsin, to be a 'prevailing party,' it is not required that a party win a lawsuit in 'all respects.' *Wis. Seafood Co. v. Fisher*, 2002 WI 134 ¶21, 255 Wis. 2d 833 (Ct. App. 2002). Instead, a party has 'prevailed' if 'he or she succeeds on an any significant issue in the litigation which achieves some of the benefit sought by bringing suit.' *Footville State Bank v. Harvill*, 146 Wis. 2d 524, 539-40 (Ct. App. 1988); *see also Wis. Seafood Co.*, 2002 WI App. at ¶21.
>
> * * *
>
> Where a party's claims 'arise out of a common core of facts,' a 'losing party is not entitled to a reduction in attorney's fees for time spent on unsuccessful claims, if the winning party achieved substantial success and the unsuccessful claims were brought and pursued in good faith.' *Radford v. J.J.B. Enters., Ltd.*, 163 Wis. 2d 534, 550 (Ct. App. 1991).

61a-62a (parentheticals omitted); *see also* 74a-77a (denying petitioner's motion to amend the judgment or for a new trial). "Applying this to the case at bar," 62a, the district court found respondent was the "prevailing party," and petitioner was not. 63a-64a. The Seventh Circuit, in turn, held that the "district court determined correctly that Emigrant's success on the in-house issue does not render it a 'prevailing party' within the meaning of the contract." 45a.

As for the question of "reasonable attorneys' fees," that term does not appear in the operative provision of the agreement, § 17.8:

> 17.8 Attorneys' Fees and Costs. If any legal action is commenced in connection with the enforcement of this Agreement or any instrument or agreement required under this Agreement, the prevailing party shall be entitled to costs, attorneys' fees actually incurred, and necessary disbursements in connection with such action, as determined by the court.

K12. While it does appear in § 5.5 of the agreement, the district court found that § 17.8 is the controlling provision because it is the most specific clause relating to attorneys' fees. 59a fn. 1. The district court specifically found, again applying Wisconsin law, that "[t]o determine what attorneys' fees and costs Emigrant is 'liable' for, the court must refer to the more specific section of the Outsourcing Agreement that dictates when a party is entitled to payment of its litigation costs. That section, 17.8, states that...." 60a. On appeal, petitioner did not challenge the application of § 17.8 rather than § 5.5 of the agreement, and the Seventh Circuit applied only § 17.8. 7a & fn.6, 44a-45a. *See* Resp. Br. in Appeal 09-3996 at 19 (noting petitioner "does not take issue with the district court's conclusion" that § 17.8 governs); *see generally* Pet. Reply Br. in Appeal No. 09-3996 (nowhere opposing respondent's assertion).

The petition's suggestion that "[t]he district court held that these provisions should be read together" is true only in the most literal sense that the court "read them together" to find that § 17.8 applied and § 5.5 did not. Pet. 7. Nevertheless, the courts below applied a gloss of reasonableness to respondent's

motion for fees "to guard against moral hazard—the tendency to take additional risks (or run up extra costs) if someone else pays the tab." *Medcom Holding Co. v. Baxter Travenol Labs.*, 200 F.3d 518, 521 (7th Cir. 1999). *See also, Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150, 153 (7th Cir. 1996) (noting that courts "interpolate the word 'reasonable' into clauses of this kind").

The substantial documentary and testimonial evidence upon which the courts below based their findings that the fees respondent actually incurred under § 17.8 were reasonable included affidavits from respondent's general counsel and its outside counsel, as well as monthly invoices showing which lawyers spent how many hours at what rates, which respondent paid in full with no assurance of recovery. *See* Dist. Ct. Dkt. 559 & 593 (including exhibits attached thereto). Based on this and other evidence, the district court found the fees respondent actually incurred were reasonable. 67a-73a. The Seventh Circuit agreed. 53a-54a.

REASONS FOR DENYING THE WRIT

I. THE EXPERT ISSUE PETITIONER POSITS IS ILLUSORY AND NOT WORTHY OF REVIEW.

A. The Seventh Circuit Properly Affirmed The Admission Of Mr. Moffat's Opinions In This Bench Trial And Appropriately Deferred To The Weight The District Court Gave Both Parties' Experts' Testimony.

The opinion below reflects that the Seventh Circuit understood and respected the distinction between qualifying an expert because of his experience on the one hand and the bases for his testimony under the criteria of FED. R. EVID. 702(1)-(3) on the other.

Separate and apart from Mr. Moffat's extensive and relevant experience, the court noted that he based his opinion regarding the commercial reasonableness of respondent's services on key facts and data in the record that allowed petitioner's online bank to meet its financial objectives and achieve substantial commercial success. 18a, 20a. Those facts and data included the number of account openings using respondent's services over the course of almost 19 months (> 257,000, 135a ¶ 75), the number of applications processed (several million, 136a ¶ 81), deposit dollars received (> $6,700,000,000), and respondent's service level performance overall (> 99%) and for E-Banking services specifically (> 98.7%), 129a ¶¶ 50-53, 130a ¶ 57, 131a ¶ 59. *See* 16a (noting the importance Mr. Moffat placed on this data). Petitioner's objection below was that Mr. Moffat should have considered additional or different data, and he was subjected to

a vigorous cross-examination about this. 22a. These bases for Mr. Moffat's testimony pertain to FED. R. EVID. 702(1).

The Seventh Circuit also emphasized that Mr. Moffat's testimony was not *ipse dixit*, but instead was based on principles and methods from the financial sector in precisely these areas of technology, 18a-20a, 19a fn.9, which satisfies the requirement that the testimony be the product of "reliable principles and methods" under Rule 702(2). Indeed, the Seventh Circuit expressly recognized that Rule 702 requires "that the expert explain the methodologies and principles that support his opinion; he cannot simply assert a bottom line." 18a-19a (internal quotations and citation omitted). And the Seventh Circuit acknowledged Mr. Moffat analyzed the data and facts from the same perspective of financial services firms that have evaluated technological innovations in the past, 20a, which meets the requirements of Rule 702(3). The petition's contention that the Seventh Circuit did not address all of the requirements of Rule 702 is belied by the opinion itself, whether it specifically cites to the subparts or not.

The Seventh Circuit also made the straightforward observation that "[a]n expert's testimony is not unreliable simply because it is founded on his experience rather than on data; indeed, Rule 702 allows a witness to be 'qualified as an expert by knowledge, skill, *experience*, training, or education.' Fed.R.Evid. 702." 18a (emphasis supplied by court). The Seventh Circuit quoted directly from Rule 702, which states that "a witness qualified as an expert by knowledge, skill,

experience, training, or education, may testify thereto in the form of an opinion or otherwise" if subparts (1) - (3) are satisfied. FED. R. EVID. 702. The committee notes to Rule 702 emphasize that the 2000 amendments did not unsettle the proposition that experience alone may provide sufficient foundation for expert testimony: "Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony...." FED. R. EVID. 702 Adv. Comm. Notes.

The bottom line is the Seventh Circuit's approach was perfectly consistent with the dictates of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), as well as both the letter and spirit of Rule 702. The court committed no error.

B. There Is No Conflict Among The Circuits.

The petition's assertion that "[e]ight other circuits apply a stringent standard in keeping with amended Rule 702," Pet. 16, whereas "the lax standard for admission applied by the Seventh and Ninth Circuits effectively conflates the separate requirements of Rule 702 that experts must be qualified *and* their testimony reliable," Pet. 12, is incorrect.

In this case and others, the Seventh Circuit has demonstrated a clear appreciation for the distinction between an expert's *qualifications* to testify and the *bases* for that testimony under subparts (1)-(3) of Rule 702. *See, e.g., United States v. York*, 572 F.3d 415, 422-24 (7th Cir. 2009) (noting that, for an expert based on experience, "Rule 702 requires more than a qualified expert and helpful testimony. [The expert]

must have had a reliable basis for opining...."); [2] *United States v. Mamah*, 332 F.3d 475, 477-78 (7th Cir. 2003) (rejecting the argument that the district court "disregarded [the experts'] impressive educational backgrounds and professional accomplishments in ruling their testimony inadmissible" because it improperly "conflat[es] subpart (1) of Rule 702, the requirement for 'sufficient facts and data,' with subpart (2) of Rule 702, the necessity for 'a reliable foundation in principles and methods'") (citation omitted). One case petitioner cites ostensibly to demonstrate a conflict between the Seventh and Eighth Circuits is *United States v. Vesey*, 338 F.3d 913, 917 (8th Cir. 2003). Pet. 12, 16. But the Seventh Circuit actually cited to *Vesey* in support of its conclusions—indeed to precisely the same pages as the petition. *See* 18a-19a fn.8.[3]

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[2] The same three Seventh Circuit judges comprising the panel in this case—Judges Ripple, Manion, Tinder—comprised the panel in *York*.

[3] The Ninth Circuit—the other circuit the petition contends conflates subparts (1)-(3)—likewise appreciates the distinction between an expert's qualifications and the bases for his opinions under subparts (1)-(3). *See, e.g., United States v. Redlightning*, 624 F.3d 1090, 1111-12 (9th Cir. 2010) (affirming the exclusion of otherwise qualified expert to testify about the phenomenon of false confessions because he "did not reasonably point to any evidence in the record or other factors or data" supporting his opinion); *United States v. Decoud*, 456 F.3d 996, 1013-14 (9th Cir. 2006) (acknowledging the distinction between an expert's qualifications based on experience and his methodology to interpret drug code words the expert had not encountered before).

C. This Case Is A Poor Vehicle To Address The Expert Issue Petitioner Has Put Forward.

This case is a poor vehicle for the Court to address the expert issue raised by the petition. First and foremost, as noted above Mr. Moffat plainly did base his testimony "upon sufficient facts or data," not to mention founded his opinions on reliable methods and principles that he carefully applied to the facts of this case. FED. R. EVID. 702(1)-(3). *See* Dist. Ct. Dkt. 541 (respondent noting in opposition to petitioner's motion to strike that Mr. Moffat based his opinions on, *inter alia*, "the number of accounts and amount of savings deposits Emigrant acquired using Metavante's Services," the "significant volume of transactions processed by those Services," "system outages, processing errors, and on-line creation problems," "the data regarding Metavante's performance," and other facts and data far beyond merely "service level performance"); 16a (acknowledging Mr. Moffat's reliance on this key data).

Another reason why this case is an unattractive vehicle for the Court's review is that the expert testimony had no bearing on the result of this bench trial. The Seventh Circuit noted the district court "made very clear that, in the final analysis, it found [the parties' expert testimony] of limited utility in making a final determination in the case." 21a. *See also* 86a (district court commenting that it "was left in all honesty to evaluate most of what has been presented to the Court in the context of what the lay witnesses had to say about this"). Any alleged error

here thus did not affect the judgment, nor does petitioner claim otherwise. *See* FED. R. CIV. P. 61.

II. THE "ERIE ISSUE" PETITIONER ADVANCES IS ILLUSORY AND NOT WORTHY OF REVIEW.

A. At Both Parties' Request, The Seventh Circuit Followed Circuit Law In Deciding Whether The District Court Abused Its Discretion By Relying On Redacted Invoices.

Federal Rule of Civil Procedure 54 states: "A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." FED. R. CIV. P. 54(d)(2)(A).[4] The Rule governs among other things the nature and quantum of evidence that must be submitted, according to the sound discretion of the district court, in support of a motion for fees. FED. R. CIV. P. 54(d)(2)(B). The committee notes point out that Rule 54(d)(2)(D) "explicitly authorizes the court to establish procedures facilitating the efficient and fair resolution of fee claims." The notes further provide that a local rule "might call for matters to be presented through affidavits, or might provide for issuance of proposed findings by the court, which would be treated as accepted by the parties unless objected to within a specified time."

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[4] The petition does not suggest fees were an element of any substantive claim in this case, and there was no such contention below.

The rule plainly covers things such as the type of evidence a district court in its discretion might choose to rely on in support of a motion for fees, such as redacted or unredacted bills. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980) ("The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court."). As such, this Court has explained that:

> [T]he question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their *prima facie* judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Hanna v. Plumer, 380 U.S. 460, 471 (1965). Petitioner's refusal even to acknowledge Rule 54, and its only bare mention of *Hanna* for a different proposition, is reason alone to deny the petition.

The petition's assertion that "[t]he Seventh Circuit ignored Emigrant's argument that, under Wisconsin law, Metavante was not entitled to fees and costs attributable to the issue on which it lost regardless of whether Emigrant were considered a prevailing party" directly contradicts the record. Pet. 10. As detailed above, the lower courts *did* apply Wisconsin law to the question of which party prevailed in the action. 61a-62a, 74a-77a. The parties in the district court, the district court itself, and the parties on appeal cited only Wisconsin law on the "prevailing party" issue. The fact that the

Seventh Circuit did not restate the wealth of Wisconsin law in affirming the district court's finding that respondent was the only prevailing party under Wisconsin law does not remotely mean the court *sub silentio* applied some other law. 45a.

In this case and others, the Seventh Circuit is well aware that in a diversity action who the prevailing party is under a fee-shifting agreement is a question of state law. *See, e.g., Tax Track Systems Corp. v. New Investor World, Inc.*, 478 F.3d 783, 788-89 (7th Cir. 2007) (construing "substantially prevailing party"). Indeed, in its merits brief below petitioner cited *Taco Bell* for the proposition that "Wisconsin law governs the prevailing party determination." Pet. Opening Br. in Appeal 09-3007 at 65 (citing *Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1077 (7th Cir. 2004)).

The lower courts' proper application of state law to the prevailing party question is not open to serious debate. Under Wisconsin law, "[a] losing party is not entitled to a reduction in attorney fees for time spent by opposing counsel on unsuccessful claims, if the winning party was substantially successful and the claims were made in good faith." *Wright v. Mercy Hospital of Janesville, Wis., Inc.*, 557 N.W. 2d 846, 855 (Wis. Ct. App. 1996); *Radford v. J.J.B. Enters., Ltd.*, 472 N.W. 2d 790, 797 (Wis. Ct. App. 1991). Here, respondent won on each and every claim and counterclaim, won either a judgment or a rejection of about $260 million of the approximately $275 million at issue in the case, and asserted all its claims and defenses in good faith, as the lower courts found. 45a-47a, 63a fn.3, 63a-64a. The district court also found the issues for which petitioner sought to

discount the fee award were inextricably intertwined with the rest of the case. 62a-63a, 76a. The Seventh Circuit agreed. 45a.

The petition's contention that Wisconsin law required a contrary conclusion because it supposedly established a cap on the amount of fees to which respondent was entitled is incorrect as a matter of fact and law, and cannot shoehorn this case into the circumstances of *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428-29 (1996). It does not fit. Respondent—the only prevailing party under Wisconsin law—was entitled to each and every dollar of costs and fees it actually incurred, as both the district court and a unanimous panel of the Seventh Circuit concluded.[5]

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[5] The petition's heavy reliance on, and characterization of, *Shadley v. Lloyds of London*, 776 N.W. 2d 838 (Wis. Ct. App. 2009), is misplaced and inaccurate. Unlike § 17.8 here, which awarded fees actually incurred in the action by the prevailing party, the agreement in *Shadley* awarded fees to the *successful* party, and nothing in the record supported a finding that the parties intended to equate "successful party" with "prevailing party." *Shadley*, 776 N.W. 2d at 840-41, 843. Based on that specific contract language, the *Shadley* court remanded for apportionment of fees based on relative "success"—the recovery of only $14,976 of the $100,000 sought in damages. *Id.* at 844. Thus, it is not at all accurate for the petition to cite *Shadley* for the proposition that Wisconsin courts require "a mathematical calculation to determine the extent to which a party has *prevailed*." Pet. 31 (emphasis added). That said, here respondent was properly determined to be 100% the prevailing party under Wisconsin law. Above and beyond the reasoning of the lower courts, the plain language of § 17.8 awards fees to the prevailing party in the "legal action" as a whole, not to be parsed out, as respondent argued below. *See* Resp. Br. in Appeal No. 09-3007 at 65-66. Continued . . .

At its core, the petition's premise is mistaken. Wisconsin law does not require the submission of a particular type of evidence or the consideration of specific factors to determine reasonableness of fees. The petition thus fails on its own terms.

In *D.L. Anderson's Lakeside Leisure Co., Inc. v. Anderson*, 757 N.W. 2d 803, 822 (Wis. 2008), the parties' agreement stated in pertinent part: "In any action concerning this Agreement, the party obtaining the monetary judgment, after all offsets, shall also be entitled to recover reasonable attorneys fees and costs." The Wisconsin Supreme Court rejected defendant's argument that the agreement did not require the award of fees for non-contract trademark infringement claims. *Id.* at 823. What's more, the Wisconsin Supreme Court affirmed the trial court's award of the *entire* fee amount out of deference to its first-hand observations and experience with the case, and did so without engaging in any discussion of the specific type of evidence required or factors that must be considered, such as those in Wisconsin Supreme Court Rule 20:1.5 upon which the petition so heavily relies. *Id.*

Here, the district court relied on *D.L. Anderson's* in awarding the full amount of fees respondent

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Petitioner's claim to entitlement to its own fees is equally unfounded. Pet. 25 fn. 12. Not only did petitioner lose on every single claim and counterclaim, but petitioner neither moved within the time frame prescribed by FED. R. CIV. P. 54(d)(2)(B)(i) nor sought leave to file a motion for fees out of time, even though upon hearing the trial court's ruling petitioner declared it had prevailed on a major issue. 114a. Petitioner thus waived any right to its own fees.

"actually incurred" in this "legal action" under § 17.8 of the parties' agreement. 58a. The petition's failure to address published Wisconsin Supreme Court authority upon which the lower courts relied in favor of unpublished Wisconsin lower court decisions is emblematic of the petition's basic shortcomings. *See* Pet. 22-23.[6]

The petition's statement that Wisconsin "*require[s]* consideration of enumerated factors" to determine reasonableness is simply incorrect. Pet. 24 (emphasis added). Wisconsin Supreme Court Rule 20:1.5 is not a rule governing fee awards; rather, it is a canon of professional conduct. It does not define "reasonable attorneys' fees." To the contrary, the rule merely provides a list of "factors to be considered in determining the reasonableness of a fee" in the context of a lawyer's relationship with her client. Resp. App. 5a. "The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance." Wis. Sup. Ct. R. 20:1.5 Comm. Notes. Although Wisconsin courts often find Rule 20:1.5 useful in considering a fee petition, its use is not mandatory. *Standard Theatres, Inc., v. Wis. Dept. Transp., Div. Hghwys*, 349 N.W. 2d 661, 672 (Wis. 1984); *Wright*, 557 N.W. 2d at 855. Wisconsin trial courts have long been permitted in the exercise of their discretion to consider a variety

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[6] Ironically, petitioner argues federal law trumps Wisconsin's rule against citing to unreported Wisconsin cases. Pet. 22 fn.9. Notwithstanding FED. R. APP. P. 32.1(a)'s prohibition, the petition's primary support for this proposition is itself an unpublished summary order the Seventh Circuit issued in 2000.

of different factors, including those based on a federal standard originating in the American Bar Association Canons of Professional Ethics. *See Touchett v. EZ Paintr Corp.*, 111 N.W. 2d 419, 423 (Wis. 1961).

The petition's misstatements of the record and Wisconsin law do not stop there. Indeed, much of the remainder of the petition is a smorgasbord of inaccuracies.

For example, the petition's contention that once respondent made a *prima facie* showing of reasonable attorneys' fees petitioner had "no ability to challenge the reasonableness of the specific fees at issue" is incorrect. Pet. 20. Petitioner could have requested an evidentiary hearing under FED. R. CIV. P. 43, but did not. *See* FED. R. CIV. P. 54(d). Petitioner could have sought discovery or served subpoenas, but did not. Or petitioner could have submitted evidence already in its possession—the amount of its own attorneys' fees—which petitioner assuredly would have done if respondent's fees exceeded petitioner's. Again, petitioner did not. 53a-54a, 69a-70a. *See Village of Shorewood v. Steinberg*, 496 N.W. 2d 57, 63 (Wis. 1993) (affirming fee award of $108,867 even though opposing party's fees totaled only $13,757). The fact of the matter is petitioner made a strategic decision to rest on its argument that respondent did not carry its burden rather than challenge the fee petition with meaningful evidence.

The petition's assertion that "nowhere in Wisconsin law does any sort of presumption of reasonableness based on market factors appear," Pet. 23, ignores that Wisconsin courts do indeed look to the market and measure reasonableness based on

fees actually incurred rather than some estimate based on an objective standard. *See, e.g., Glamann v. St. Paul Fire & Marine Ins. Co.*, 424 N.W. 2d 924, 927 (Wis. 1988). Here, evidence that a sophisticated client negotiated a discounted fee, that its general counsel carefully monitored both the legal work and the billing for those services, and that the client paid those bills with no assurance of recovery are all powerful indicators of reasonableness. The petition may derisively dismiss that hard evidence as "market factors," but there is no escaping the fact that it is persuasive proof of the reasonableness of respondent's fees.

The petition's related suggestion that the Seventh Circuit shifted the burden onto petitioner, the non-movant, is untrue. All agree respondent bore the initial burden to demonstrate its fees actually incurred under § 17.8 were reasonable. The question was not *who* had the burden, but whether respondent *carried* its burden. Again, petitioner's complaint here boils down to whether the district court abused its discretion by relying on, among other things, redacted bills.

Any suggestion that the panel's (Ripple, Manion, Tinder, J.J.) opinion was an ideological, doctrinal decision that relied only on "market forces" is misplaced. In fact, it was a careful, fact-based decision driven by the specific circumstances of this case. As the Seventh Circuit noted, the district court "made the determination of reasonableness on the basis of not only the presumptive validity of market forces, but also the affidavits of the parties which assured the court that rates had been negotiated,

supporting documentation had been reviewed and pertinent questions asked." 53a.[7]

B. There Is No Conflict Among The Circuits.

In suggesting a conflict exists between the Seventh Circuit on the one hand and the Tenth and District of Columbia Circuits on the other, the petition cites *Westar Energy, Inc. v. Lake*, 552 F.3d 1215 (10th Cir. 2009), and *Ideal Elec. Sec. Co. v. Int'l Fidelity Ins. Co.*, 129 F.3d 143 (D.C. Cir. 1997). Pet. 32-33. The petition misstates both cases and their import here.

In *Westar*, contrary to the petition's statement, the court did *not* "predict[] what the Kansas Supreme Court would do" on the issue of what factors to consider in determining the reasonableness of a fee award. Pet. 32. Rather, those factors were not in dispute because, as the Tenth Circuit observed, the district court "analyze[d] the fee award using essentially the same factors" as under Kansas

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[7] Respondent also urged the lower courts to consider petitioner's no-holds-bar litigation strategy and obstreperous behavior during discovery, which significantly drove up the cost of this protracted litigation. *See* Resp. Br. in Appeal 09-3996 at 39-42, 42 fn.9. The district court felt it unnecessary to decide this issue, 72a, though it noted on prior occasions the unusual zeal with which the case had been litigated. Dist. Ct. Dkt. 493 (12/2/08 Tr. 9) ("[I]f every case that I had to deal with was dealt with with the degree of intensity that is either driven by your respective clients or the nature of your respective practices, we could not function as a court ... [I]t take cases like this frankly to bring changes in the rules...."). The Seventh Circuit did not rely on this as a basis to affirm the fee award. Nonetheless, it is a proper additional reason respondent was entitled to the full fee award.

law. *Westar*, 552 F.3d at 1228. The actual question in *Westar* was whether the company's agreement to pay its officers' "expenses" required the company to advance attorneys' fees for the defense of an officer charged with criminal wrongdoing. *Id.* at 1228-29. One difficulty in answering the question was that the specific agreement's indemnity provision "define[d] expenses to include attorneys' fees 'reasonably incurred,'" but the advancement provision did not. *Id.* at 1229. It was in that unique advance pay context that the Tenth Circuit tried to "predict what the Kansas Supreme Court would do if faced with the issue" *of who bore the burden of proof* to determine the reasonableness of fees according to the terms of that specific agreement. *Id.* at 1228.

Here, we have a different agreement whose fee provision—§ 17.8 (K12)—was in fact construed according to Wisconsin law, just as the parties jointly requested. Further, all agree respondent bore the burden of demonstrating the reasonableness of its "attorneys' fees actually incurred" under § 17.8 of the agreement. Again, the only question was whether respondent carried its burden by submitting, among other evidence, redacted bills. The lower courts concluded respondent did; petitioner persists in arguing respondent did not. That conclusion by the district court and a unanimous panel of the Seventh Circuit is not at all in conflict with *Westar*.

The petition's reliance on the law of the District of Columbia is curious. For one, that jurisdiction does not require a party to submit any evidence, let alone itemized bills, in support of a fee petition in a contractual fee-shifting case, allowing the trial court who has witnessed the proceedings first hand to

determine reasonableness. *See, e.g., Urban Masonry Corp. v. N&N Contractors, Inc.*, 676 A.2d 26, 35 (D.C.C.A. 1996) ("We have often held that when the court decides the reasonableness of an attorney fee award, itemized bills and testimony are not absolutely essential to support its finding.") (citation omitted).

Moreover, while the forum shopping concerns may be the same, *Erie* does not mandate application of District law, and the constitutional considerations of *Erie* are not implicated (nor is the Rules Decision Act, 28 U.S.C. § 1652) because "the District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment." *Lee v. Flintkote Co.*, 593 F.2d 1275, 1278 fn.14 (D.C. Cir. 1979). *Ideal*, relied upon by petitioner, does not even mention *Erie* or indicate the parties argued any potential tension between federal and District law. 129 F.3d at 150-52.

Contrary to petitioner's assertion, the Seventh Circuit's decision here does not conflict with *Ideal*. Pet. 33 fn.19. The fact that the *Ideal* court concluded itemized bills should have been provided in the specific facts and circumstances of that case is of no moment. It very well may be true that a district court should consider such evidence in a given case. Here, the Seventh Circuit expressly left open that possibility, but affirmed the district court's exercise of discretion on the record of this case not to require it. 53a. The court emphasized its narrow holding: "We only hold that in most situations, as here, this responsibility [of district courts to review fee petitions] can be discharged without line-by-line scrutiny of submissions." 54a.

The petition's representation that since *Balcor* no court has looked beyond so-called irrefutable market considerations is mistaken. Pet. 26-27. Setting aside the fact that in this case the courts below relied on much more than mere market forces, 53a-54a, courts have not hesitated to require even more exacting evidence when circumstances require it, just as the Seventh Circuit contemplated might be appropriate in other cases, but was not necessary here.

In *Bock v. Computer Assocs. Int'l, Inc.*, No. 99 C 5967, 2002 WL 511560 (N.D. Ill. Apr. 3, 2002), for example, the fee-shifting agreement required the payment of plaintiff's fees "whether or not he was successful," so plaintiff had no incentive to keep his fees down. *Id.* at *3. The *Bock* court therefore conducted a more comprehensive analysis of plaintiff's billing records and required the submission of more detailed evidence of the work performed. *Id.*

Similarly, in *Zeidler v. A&W Restaurants, Inc.*, No. 99 C 2591, 2001 WL 561367 (N.D. Ill. May 21, 2001), several factors caused the court to question the reasonableness of fees actually paid, including that the prevailing party requested $250,000 in fees in "a lawsuit involving a damage claim of at most $300,000 ... and probably far less than that"; that the prevailing party submitted no affidavit "from a responsible person within the company" regarding fees or the expectation of recovery under the parties' fee-shifting agreement; and there was a "significant" disparity between the fees the prevailing party sought and the fees the losing party incurred (a comparison that cannot be made here because

petitioner steadfastly refused to disclose its own fees). *Id.* at *3-5.

C. This Case Is Not The Appropriate Vehicle For Addressing The "*Erie* Issue" Petitioner Has Manufactured.

Even had the petition's so-called *Erie* issue been pressed or passed upon below, this case would be a particularly inappropriate vehicle to address it for a host of reasons, not the least of which is that the *Erie* concerns of forum shopping and the inequitable administration of the law are not implicated here.

For one, the result here would be the same whether the factors under Wisconsin Supreme Court Rule 20:1.5 were expressly applied or not. Those factors are not meaningfully different from the ones the lower courts actually employed in this case, including: the stakes of the case, the fact that the negotiated fees were discounted and paid without assurance of recovery according to commercially reasonable practices (such as the detailed review by respondent's general counsel), the rates charged, the fact that fee write-offs were provided, the total hours expended, affidavits from respondent and its outside counsel, and the fact that petitioner did not cast any doubt on the fees' reasonableness by, for example, disclosing its own fees as a measuring stick. *See, e.g.*, 67a-72a, 111a-112a, Resp. Br. in Appeal 09-3996 at 49-51. *Compare* Resp. App. 5a.

Petitioner's complaint of forum shopping is particularly off base since petitioner chose the forum for this case by removing the action to federal court. Petitioner's related suggestion that it was penalized for exercising the right of removal is also misplaced. Pet. 28. If as the petition contends, Pet. 20-21, the

Seventh Circuit truly had a clear and long-standing rule in violation of *Erie*, which supposedly so obviously worked to petitioner's detriment, petitioner certainly would have pressed the *Erie* issue below, rather than raise it for the first time in its petition for writ of certiorari. In any event, forum shopping concerns in the context of a fee dispute like this one are minimal because an award of fees is speculative and entirely contingent on prevailing on the merits.

Another reason this case is not appropriate for further review is because the specific terms of the parties' agreement entrusts the question of how to measure fees exclusively to the trial court. Specifically, § 17.8 states in pertinent part that "the prevailing party shall be entitled to costs, attorneys' fees actually incurred, and necessary disbursements incurred in connection with such action, *as determined by the court*." K12 (emphasis added). The parties unique agreement here makes this a particularly inappropriate case from which to extrapolate any broader principle.[8]

The upshot of petitioner's position would be to drive a wrecking ball through Rule 54—or as this Court put it many years ago, disembowel it. *Hanna*, 380 U.S. at 1145 ("To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress'

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[8] Respondent raised this below as an alternative basis to affirm the fee award, but the Seventh Circuit did not reach it. *See* Resp. Br. in Appeal 09-3996 at 23-24.

attempt to exercise that power in the Enabling Act."). If petitioner were right, in every diversity case in which the right to fees arose under a contract or state statute, Rule 54 would be meaningless, and federal courts would have to decipher and apply potentially 50 different state rules. This would further drive up litigation costs and engender still more litigation unrelated to the merits. The procedures and type of evidence federal district courts are permitted to employ and consider in their discretion under FED. R. CIV. P. 54(d) are designed to avoid this sort of ballooning litigation unrelated to the merits.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

Respondent's Appendix A

FEDERAL RULE OF CIVIL PROCEDURE 54(d)(2)

(d) (2) Attorneys' Fees.

(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) Proceedings. Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge. By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning

the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) Exceptions. Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

Respondent's Appendix B

28 U.S.C. § 2072

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Respondent's Appendix C

28 U.S.C. § 1652

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Respondent's Appendix D

WISCONSIN SUPREME COURT RULE 20:1.5.

SCR 20:1.5. Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b)(1) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when

the lawyer will charge a regularly represented client on the same basis or rate as in the past. If it is reasonably foreseeable that the total cost of representation to the client, including attorney's fees, will be $1000 or less, the communication may be oral or in writing. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2) If the total cost of representation to the client, including attorney's fees, is more than $1000, the purpose and effect of any retainer or advance fee that is paid to the lawyer shall be communicated in writing.

(3) A lawyer shall promptly respond to a client's request for information concerning fees and expenses.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by par. (d) or other law. A contingent fee agreement shall be in a writing signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter

and if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee:

(1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance or property division.

(2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

(e) A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or

(2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or

(3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is

informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.